

OPEN MEETING LAW REGULATION

PUBLIC HEARING

1350 Main Street
Springfield, Massachusetts 01103

Tuesday, August 10, 2010

PANEL:

From the Attorney General's Office

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Sheila Calkins
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P R O C E E D I N G S

BRITTE MCBRIDE: Good afternoon. My name is Britte McBride and I am the Director of the Division of Open Government in the Attorney General's office. With me from the Attorney General's office are Sheila Calkins, Chief of Staff; Jan Healy, the Chief of the Western Massachusetts office of the Attorney General and Jonathan Sclarsic, the Assistant Attorney General in the Division of Open Government.

Today is Tuesday, August 10, 2010.

This is a public hearing to receive testimony on the Open Meeting Law regulations included at 940 CMR 29.00 as promulgated by the Attorney General. These regulations were promulgated as emergency regulations on July 1, 2010. This hearing is being held pursuant to Chapter 30A, Sections 2 and 3 of the General Laws and under the authority granted to the Attorney General by Chapter 30A, Sections 25(a) and (b) of the General Laws. The notice for this hearing was published in the State Register by the Secretary of State

1 on July 23, 2010. And I do apologize to
2 anyone who may have been notified this
3 hearing was occurring at one o'clock today.
4 That was erroneous information obviously and
5 we apologize for anyone who was
6 inconvenienced by that fact.

7 The purpose of these regulations is to
8 interpret, enforce and effectuate the
9 purposes of the Open Meeting Law Chapter 30A,
10 Sections 18 through 25 of the General Laws.

11 This is the third of four public
12 hearings we are holding on these regulations.

13 The purpose of this hearing is to
14 receive comments on the emergency regulations
15 promulgated July 1st. We ask that you limit
16 the scope of your comments during this
17 hearing to the regulations before us. And
18 for anyone who needs copies of the
19 regulations, there are some available on the
20 table outside. We're eager to hear oral
21 testimony from anyone who wishes to speak.
22 We ask that those who wish to testify sign up
23 on the sheet outside. We will call
24 individuals to testify in the order in which

1 they have signed up.

2 In order to ensure that everyone who
3 wishes to speak will be able to do so without
4 undue delay, we ask that you limit your
5 testimony to seven minutes. And at the
6 conclusion of everyone's testimony, if you
7 wish to approach and to continue testimony,
8 we would certainly be happy to do that. We
9 have a stenographer transcribing the
10 testimony. So we ask that you make your best
11 effort to speak clearly, and before you begin
12 your remarks, if you could please state and
13 spell your name so it is represented
14 correctly in the record. That would be
15 helpful.

16 Finally, public comment on the Open
17 Meeting Law regulations will remain open
18 until August 18th. We will accept written
19 comments today during the hearing, and you
20 can just submit them to the front table. I
21 note for the official record that the town
22 Southwick Lake Management Committee have
23 submitted comments and made a request that
24 the comments be acknowledged during the

1 heari ng.

2 You may also submit written comments
3 through e-mail to openmeeting@state.ma.us or
4 through postal mail to the office of the
5 Attorney General. Additional information
6 pertaining to the Open Meeting Law, these
7 regulations and hearings may be found on the
8 Attorney General's website.

9 And with that, I would like to start
10 testimony with Bob Horacek, please.

11 BOB HORACEK: Go up here?

12 BRITTE MCBRIDE: Please. If you
13 could just state and spell your name, please.

14 BOB HORACEK: Sure.

15 BRITTE MCBRIDE: Thank you.

16 BOB HORACEK: It's Bob. And the
17 last name is spelled H-o-r-a-c-e-k. I'm from
18 Southwick, Mass.

19 And the comments we'd like to make with
20 respect to the posting methods are that it's
21 a very expensive proposition for us to have
22 to put in an outside board and the continuing
23 expense of maintaining it, especially in the
24 winter months where we've got to clear a path

1 to get to it and so forth. And probably even
2 could create some problems if somebody's
3 trying to get to the board while it's icy or
4 whatever, you know, if they are going down
5 there at odd hours of the night. So, it
6 could become dangerous. So anything that you
7 can find, such as under your 29.04
8 alternative posting methods like Section 5
9 that could eliminate the need for that board,
10 either a phone recording of the meeting
11 minutes, I think that would be certainly
12 helpful. Or just a web posting. If we were
13 able to do that instead, would certainly be
14 helpful.

15 And just a comment, again, to be
16 redundant, sorry about that, but with respect
17 to video conferencing or for, you know, phone
18 in to open meetings, other states are doing
19 it. We're a little behind the times I think
20 with respect to that. In our situation, we
21 have an associate member for one of our
22 boards who has a wealth of experience, one of
23 our former selectperson's, she's here only
24 about a third of the time. She can't

1 participate in the meetings when she's not
2 here because we don't allow video
3 conferencing. So we lose her counsel and her
4 experience. So it would be nice to have that
5 ability to have that option should we desire
6 to use that.

7 And that's pretty much all I had to
8 say. So, thank you for your time.
9 Appreciate it.

10 BRITTE MCBRIDE: Thank you very
11 much.

12 SHEILA CALKINS: We got you out of
13 here on time.

14 BOB HORACEK: Great job, Sheila.
15 Thank you.

16 BRITTE MCBRIDE: Next is Pam Beall.

17 PAMELA BEALL: Thank you. My name
18 is Pamela Beall, B-e-a-l-l.

19 BRITTE MCBRIDE: I apologize. I'm
20 going to apologize in advance to anyone whose
21 name I butcher.

22 PAMELA BEALL: How could you know?
23 A little Scottish vowel in there, what can I
24 say?

1 Thank you, Director and staff, for
2 having this public hearing and for having it
3 more or less in my backyard in western
4 Massachusetts. My name is Pamela Beall I am
5 the elected town clerk in Brimfield where I
6 conduct a part-time one person office, and
7 that one person is me. I've held that
8 position for 16 years. My other job is an
9 administrative secretary to the Board of
10 Selectmen in Wilbraham where I have been
11 happily employed for 13 years. In addition,
12 I've been active in local government for some
13 30 years serving as member, clerk and
14 occasionally staff to the finance committee,
15 the Board of Health, the historical
16 commission and various other town building
17 committees.

18 I know that many town clerks and
19 administrative managers have shined the
20 spotlight on flaws on house 41.33. You and
21 area legislators have heard not only from
22 town officials but also from the professional
23 associations that represent the interests of
24 our many volunteer boards and committees. I

1 appreciate having the opportunity at
2 conferences and in this forum to speak to the
3 regulations which are flawed, and I hope that
4 the regulations, the regulations which try to
5 address some of the flaws in the statute.

6 My comments are from the perspective of
7 the small town. Bigger towns and cities have
8 similar concerns, magnified many times
9 larger. The best parts of the statute and
10 therefore the regulations, are in my opinion
11 the definitions. And also the provision that
12 we have some method to resolve complaints
13 locally. But in particular I would like to
14 address how loose and imprecise language in
15 the regulations and guide despite the good
16 definitions in the statute needs to come
17 under some scrutiny because there is some
18 muddling of ideas and concepts that are
19 rather fundamental.

20 In the statute the definitions include
21 a definition for the word person. Kind of
22 odd to be sure, but I think that I understand
23 why the definition is there, because as we
24 move through this statute and companion

1 regulations and even the guide, there's an
2 imprecise use of well-defined terms, like
3 "public body" and "municipality." And
4 confusion over "filing" and "posting" among
5 other things. The responsibility for posting
6 and filing notices is addressed in the
7 regulation Section 20(b) of the statute. And
8 it states that the responsibilities is
9 assigned, quote, to the public body for
10 posting notices and filing notices with the
11 town clerk. The public body has two
12 responsibilities: Posting and filing with
13 the town clerk.

14 The regulations seem to anticipate the
15 flaw in this; namely, that a public body may
16 director or authorize or cause notices to be
17 posted, but the piece of paper or even an
18 electronic version of the notice has to be
19 posted by the action of a person. So the
20 regulation writer not knowing who this person
21 might be, jumps in sort of sideways by
22 interjecting into the regulations that the
23 municipal clerk or such other person
24 designated by the municipality shall post the

1 notice of the meeting. And that is what I
2 mean by loose and imprecise language. It
3 confuses us.

4 The General Law defines municipality as
5 a city or town. So how does the municipality
6 designate such a person? The municipality is
7 not the Board of Selectmen. The municipality
8 is not the town administrator. The
9 municipality would most likely be in my world
10 the town meeting. And if town meeting is
11 going to be designating someone to do
12 something under this statute, it had better
13 be through a by-law. Not only do the
14 regulations muddle the ideal of public body
15 in the municipality, but the guide also
16 asserts that the municipality must post
17 notices. Municipalities are not walking,
18 talking entities who can run around posting
19 notices. For example, municipalities usually
20 have constables on call to post town meeting
21 and election warrants. It's a person who
22 does the posting, not the municipality. The
23 old statute has clear statements on these two
24 points and it is loosely -- closely mirrored

1 in the new statute with a bit more officious
2 language.

3 Here's what the old statute says:

4 Notice of every meeting shall be filed with
5 the clerk. And notice or a copy thereof
6 shall be publicly posted in the office of
7 the counselor or on the official bulletin
8 board. Such filing and posting shall be the
9 responsibility of the officer calling such
10 meeting. The responsibility is on the
11 officer calling the meeting, the public body.
12 Not on the town clerk to post, only to accept
13 a filing copy.

14 And here's what the new statute says,
15 it's very close: A public body shall post
16 notice of every meeting. And notice shall be
17 filed with the municipal clerk and posted in
18 or on the municipal building in which the
19 clerk's office is located, and so on.

20 Again, it puts the responsibility on
21 the public body to post the notice and to
22 file it with the clerk. There is nothing
23 about the clerk posting the notices. Nothing
24 in there about the municipality designating

1 someone. Nothing about the municipality
2 posting notices. The new statute does not
3 imply even indirectly that the town clerk
4 should be responsible for posting every
5 single meeting notice. The statute does not
6 provide for an alternative designated person.
7 That idea appears only in the regulations.
8 It is not suggested, mentioned or even
9 clarified in the AG guide. The regulations,
10 and to a lesser extent, the AG guide confuse
11 a posting of the notice with the filing of
12 the same with the town clerk. Filing with
13 the town clerk is mere record keeping and
14 serves of proof of what was posted and when.
15 This is a distinction in the old statute and
16 in the new statute, but comes out totally
17 muddled in the regulations and in the AG's
18 guide. The distinction between filing and
19 posting is not academic or insignificant.
20 The phrase in the regulations, it states:
21 The municipal clerk shall post notice of the
22 meeting, turns over the role of the public
23 body and makes the town clerk responsible for
24 missed deadlines, late postings or missing

1 content. Not only does the language and the
2 regulations which is not repeated in the
3 guide, place this burden on the town clerk,
4 but such a responsibility is not contemplated
5 in the statutory language. It is interjected
6 into the regulation.

7 I would further argue that cities and
8 towns which voluntarily adopt an alternate
9 posting method, one which perhaps requires a
10 third party to be involved such as an IT
11 director, web master or public access
12 television volunteer cannot also make that
13 person solely responsible for the timely
14 posting and content of the notice for every
15 single board and committee throughout all of
16 government. If that is to be the case, then
17 what is the point later in the statute for
18 filing a complaint with the public body? If
19 by the language of the statutes, the town
20 clerk is responsible for posting all notices,
21 then all complaints involve the town clerk
22 should be directed to the town clerk and she
23 would be the one and only one facing
24 enforcement and penalties for improper

1 notice. Be clear, be concise. I don't think
2 you're there yet.

3 Here are some recommendations. Insert
4 a simple and clear language from the original
5 statute, keeping the distinction between
6 filing and posting and clearly assigning
7 responsibility. Quote, such filing and
8 posting shall be the responsibility of the
9 officer calling such meeting. And add a
10 definition in the regulations if you agree
11 that this distinction has value, as it does
12 in the old statute and the new statute. Or,
13 as another suggestion, follow more closely
14 the new statute's language and structure
15 relative to the public body, municipality and
16 town clerk with clarifying language. I think
17 that's certainly the intent of the AG guide,
18 but it's not there yet. It could say, for
19 instance, quote, the public body is
20 responsible for the statutory requirements of
21 posting and filing meeting notices. The
22 public body may designate a person such as
23 chairman, vice chairman, clerk or staff to
24 post the meeting on the bulletin board or

1 al ternati ve pl ace desi gnated by the chi ef
2 executi ve offi cer of the ci ty or town. A
3 copy of the noti ce shal l al so be fi led wi th
4 the town clerk. The town clerk shal l keep
5 such fi lings i n an orderl y fashi on for publ ic
6 revi ew on demand duri ng regul ar busi ness
7 hours of the offi ce. That' s my proposal .

8 On the bul leti n boards and al ternati ve
9 methods I thi nk the new statute authori zes
10 the AG to prescri be or approve al ternate
11 posti ng methods. The whol e i ssue of bul leti n
12 boards versus other methods has been beaten
13 i nto submi ssi on al ready, and al ternati ves to
14 be used i n addi ti on to the more tradi ti onal
15 posti ng has been i temi zed and i ncl uded.
16 However, once again the regul ati on wri ter i s
17 at a l oss and deci des that the town clerk
18 must fi le the posti ng method wi th the AG
19 offi ce. No such noti ce requi rement i s
20 menti oned i n the statute. There i s no rol e
21 i n the statute for the town clerk.

22 Furthermore, i n the statute the AG i s
23 charged merel y wi th, quote, approvi ng
24 al ternate methods. Yet the regul ati ons

1 create another layer of reporting paperwork
2 for town clerks, even those whose
3 municipalities are not going to be using any
4 alternate methods but rely on the lowest
5 common denominator, the bulletin board in a
6 public place, 24/7.

7 So, my recommendation is limit this
8 reporting requirement in the regulations to
9 those cities and towns which intend to
10 utilize one of the prescribed alternatives
11 and leave the rest of us alone. And also,
12 drop the convoluted language in regulations
13 29.03, subs 3 and 4. Where it uses a phrase,
14 quote, prescribed or selected by local public
15 bodies, which is in the plural and I do not
16 understand why. In that city or town the
17 statutory language is clear enough and is not
18 hard to understand. So the muddled language
19 in the regulations is totally uncalled for.
20 The good news is it is not repeated in the AG
21 guide. The bad news is is that the
22 regulations in the AG guide are not
23 consistent. I'm sure we can all get to the
24 same page.

1 On the question of the information to
2 be provided and the records to be kept of
3 materials to be distributed, the entire idea
4 of distribution of the Open Meeting Law
5 materials which currently in my folder run 39
6 pages, is going to be a thorn in the side of
7 our municipalities. To say nothing of a
8 large cost of printing. Yes, I can send
9 people to download the forms at home off the
10 computer, their own computers, but then
11 there's a disconnect of them having the
12 documents in hand by their own action and me
13 getting the acknowledgement or certification
14 that they have them and read them and
15 understand them. There's a big disconnect.
16 So, it is more direct if I hand them the
17 regulations printed and get the certification
18 and acknowledgement back.

19 The statute sets an odd -- has an odd
20 phrase saying that we should provide such
21 documents within two weeks of taking the -- I
22 forget what it says now. Within two weeks of
23 qualification for office, and then it goes on
24 to say just a few sentences further on, that

1 it should be provided upon entering into
2 service. These are some silly ideas that
3 generate a lot of paperwork, including that
4 there will be a certification receipt as you
5 know. That the officer understands what he
6 or she has read. I don't want to certify
7 that. In this part, let's just keep our eyes
8 on the prize. What is the objective and why
9 do the regulations in the AG guide seem to
10 ignore it or dance around it?

11 Keeping track of this two week window
12 for as many as 200 appointees, is a flaw in
13 the statute. It's basically unenforceable.
14 This is one area where I think we would be
15 better served if it is centralized with the
16 town clerk.

17 There is some simple clear language
18 that could centralize this function and
19 anchor it to the taking of the oath of office
20 with the town clerk. All persons appointed
21 and elected to multi-person boards must do
22 this. This is the time to hand over the
23 regulations, which we have traditionally done
24 under the old statute, to hand over the

1 regulations and the guide and to collect the
2 appropriate receipt and acknowledgement. And
3 you can insert very clear language, again,
4 either in the statutes or the guide. Open
5 Meeting Law materials shall be delivered by
6 the town clerk, not the appointing authority
7 or some management officer. The town clerk
8 does this job. Gives the oath of office.
9 Make it a matter for the town clerk to
10 distribute these. To members and staff of
11 the multiperson boards and committees,
12 whether elected or appointed, upon taking the
13 oath of office and before entering into
14 public service. And the town clerk -- you
15 could go on in the guide or the regulations
16 -- the town clerk shall maintain an
17 acknowledgement receipt for each such person
18 indicating the date received the Open Meeting
19 Law materials. While the statute allows for
20 the appointing authority to keep such
21 acknowledgements, centralizing this function
22 and linking it to taking the oath of office
23 with the town clerk will be preferred as well
24 as convenient and expeditious for everyone.

1 And believe me I don't want to insert the
2 town clerk in too many tasks here, but this
3 is one where I think it would work.

4 The last part I would like to comment
5 on here in person is the complaint procedure
6 for the local public bodies. There are two
7 particular problems with the complaint
8 procedure as outlined in the regulations and
9 the guide. Namely, there again is a large
10 disconnect between the simple language of the
11 statute, which states that the complaint is
12 filed with the public body and the language
13 of the regulations, which states the
14 complaints involving local public bodies will
15 be filed with the town clerk. The guide is,
16 the guide is completely silent about any role
17 for the town clerk. Again, I note that this
18 statute contemplates no role for the town
19 clerk at all. If you believe that the town
20 clerk's office is a good place for this
21 clerical task of recording a complaint, then
22 don't widen the scope and make the town clerk
23 a central clearing house for circulating and
24 distributing to the public body. For

1 example, we accept as a matter of course
2 zoning and planning applications for filing.
3 It is not an unfamiliar task. But accepting
4 those applications does not follow that it --
5 we are responsible for forwarding them to the
6 boards and committees. We are not. It is
7 the applicant's responsibility to do that,
8 creating a clear and direct working
9 relationship between the applicant and the
10 board involved.

11 Further, the boards must file decisions
12 back to the town clerk, but we are not
13 responsible for giving notice to the
14 applicant about the outcome. Recording and
15 filing are clerical tasks accepted, but being
16 responsible for and then forwarding and
17 distribution to the various boards puts us
18 into an administrative oversight area
19 involving the town clerk more directly and
20 the adjudicatory aspects of the complaint
21 which cannot begin until the town clerks take
22 some action. The regulations in the guide
23 but not the statute have created an elaborate
24 and confusing procedure for deadlines

1 requesting more information from the
2 Complainant within seven days. Complainant
3 response ten days. Public body response
4 another ten days. All that when the statute
5 makes a clear, simple statement that the
6 public body must review and respond within 14
7 days. It creates an almost judicial like
8 atmosphere for the local body, and it is more
9 lawyerly than would be expeditious. We could
10 perhaps get to a reviewing resolution within
11 the 14 days, but we've overlaid something
12 that's a little more complicated for some
13 state boards or committees perhaps where it's
14 important to do that.

15 Because I am speaking for my town,
16 where all boards and committee positions are
17 all filled with volunteers, and only a few
18 have administrative help, the deadlines for
19 the first step the seven, ten, ten calendar
20 as I said, sounds more like the preliminaries
21 for a Supreme Court hearing. It is not part
22 of the statute. It is not consumer friendly.
23 It sets up a barrier to the very negotiations
24 which the statutes envision between the

1 public body and the citizen Complainant. And
2 just for the record, newspaper publishers
3 only have the same rights as citizens to make
4 a complaint about Open Meeting Law.

5 I notice that the Massachusetts
6 Newspaper Publishers Association has been
7 elevated to the point where it has its own
8 definition in the regulations and has carved
9 out an entitlement to notices from the
10 Attorney General's office about draft
11 advisory opinions.

12 If the Attorney General wants to
13 encourage and negotiate a resolution or
14 remediation at the local level, then there
15 must be some guidance or standards for local
16 action. Otherwise the Complainant and the
17 public body will never see this problem the
18 same way. They will be jumping through the
19 hoops, meeting a whole series of deadlines,
20 getting nowhere until the complaint expires
21 due to a missed deadline or sheer confusion.
22 Or the Complainant and the public body meets
23 all of the deadlines, but the Complainant is
24 not satisfied with the outcome since there

1 are no standards. And it all gets forwarded
2 to the AG anyway as an unresolved local
3 complaint.

4 Tell us what the local body should be
5 looking for and what kinds of actions would
6 be appropriate to take. The board needs to
7 know that, and the citizen Complainant needs
8 to know that so they know they've been
9 treated fairly within some kind of umbrella
10 guidance that comes from the AG's office.
11 Then we can resolve complaints locally.

12 So my recommendation is stick to the
13 language in the statute. Namely, that the
14 complaint is filed with the public body. And
15 if you believe it is helpful, you could add
16 language such as a copy of the complaint
17 shall also be filed with the town clerk. The
18 town clerk shall keep such filings in an
19 orderly fashion for public review on demand
20 during regular hours of the office. Stick to
21 the language in the statute; namely, that the
22 local public body has 14 days from receipt to
23 respond with a resolution and file it with
24 the AG. Drop the convoluted seven, ten, ten

1 calendar. This is guidance only as to
2 procedure and not to the merits of the
3 complaint. This procedure will raise more
4 questions than it answers, and especially
5 since by the statute, to read the statute by
6 itself, the Complainant would have every
7 reason to expect to review a resolution
8 within 14 days. Provide guidance to our
9 local public bodies and citizens by
10 publishing some standards that all parties
11 will understand and be acceptable remediation
12 and resolution for the local level. And you
13 can include certainly such items as the
14 public body may request additional
15 information, and the public body may ask for
16 an extension from the AG which is mentioned
17 in the statute.

18 Those are some of the key points that I
19 wanted to make in oral presentation to you
20 today. I've been working since October of
21 2009 on this through the Massachusetts
22 Association of Town Clerks. I've come up
23 with this chart which I have updated. It
24 shows the old statute, the new statute,

1 regulations and the Attorney General's guide
2 along with comments and questions. There are
3 many other areas of concern. I'm going to
4 submit this as written material.

5 You've been very patient with me, thank
6 you.

7 BRITTE MCBRIDE: Thank you.

8 Ms. Beall, would you like us to take
9 that?

10 PAMELA BEALL: Today, now?

11 BRITTE MCBRIDE: We can take it now,
12 absolutely.

13 PAMELA BEALL: I have copies now
14 that I didn't scribble on. I have extra of
15 the these charts if anyone wants them.

16 BRITTE MCBRIDE: Denise Martinez.

17 DENISE MARTINEZ: My name is Denise
18 Martinez, D-e-n-i-s-e M-a-r-t-i-n-e-z. I'm a
19 staff member in the Chicopee city clerk's
20 office.

21 Our concerns are parallel to everybody
22 else's. Our main concern is that the
23 building that we're in is extremely old. Our
24 office is only accessible through elevator

1 and ramp to handi cap persons, and so our
2 bul let in board is outside of our offi ce. The
3 side of the offi ce that we're on, there is no
4 handi cap accessi bi li ty. So for us to post a
5 bul let in board out front of the buil ding, it
6 would be at the top of a set of stai rs.
7 Agai n, if we did the el ectroni c, those are
8 very expensi ve.

9 And our second mai n concern is the
10 posti ng of the ci ty counci l meeti ngs. Our
11 agenda i tems can be very l engthy and very
12 l arge. And we're a l i ttle confused as how
13 we're supposed to post them on the meeti ng
14 noti ces themsel ves. Because if we were to
15 post an agenda wi th the meeti ng noti ce, our
16 l ast agenda was 139 pages. So I don't know
17 how we woul d post that wi th a standard
18 meeti ng noti ce. And I thi nk there was 42
19 i tems. So even if we did an abri dged
20 versi on, i t's sti ll goi ng to be mul ti -pages.
21 We're j ust tryi ng to fi gure out how to fol low
22 the l aw.

23 Thank you.

24 BRITTE MCBRIDE: Thank you.

1 Certainly and I'll reiterate this several
2 times throughout the hearing, public comments
3 are definitely welcome and our comment period
4 is open until August 18th, and we encourage
5 everybody to submit written comments in
6 addition to any oral testimony.

7 Mark Gold.

8 MARK GOLD: Good afternoon. My name
9 is Mark Gold, M-a-r-k G-o-l-d, and I'm a
10 select board member in the town of Long
11 Meadow and I just had a couple of comments
12 that I wanted to go through here.

13 Kind of starting at the front and
14 working toward the back. And one of the
15 issues we currently are having now is under
16 the definitions. The definition of the
17 public body, we're still having an issue
18 because there is this exemption that says,
19 however, that the governing body, board of a
20 local housing redevelopment or similar
21 authority shall be deemed a local public
22 body. We're having an issue right now with
23 the school building committee and
24 subcommittees and sub, subcommittees and at

1 what point does this continue to apply? And
2 so that I would like to see that addressed.

3 Also, the notice posting, it says may
4 be placed in a loose leaf binder in a manner
5 conspicuously visible. What's conspicuously
6 visible to one person may not be to another,
7 and we've had some issues with that already,
8 of whether it's conspicuously visible.

9 Particularly another concern is 29.05
10 complaints. I understand that we don't want
11 to be running around dealing with anonymous
12 complaints, but I think there does need to be
13 a provision in here for what I'll call a
14 third party, something like an ombudsman type
15 complaint system, especially when you get
16 into small towns and cities where there are
17 people who may choose not to or feel they are
18 not comfortable filing a complaint directly
19 with the, if you will, the offending
20 committee. I think there ought to be some
21 provisions for what I'll say is a third party
22 type of issue.

23 And finally my comments would be on the
24 issues of remediation or resolution 29.07.

1 One of the concerns that we've got is that
2 there's no immediate resolution either for,
3 you know -- it basically says that if you
4 bring it to the board and the board is in
5 violation, their response is sorry, we won't
6 do it again. And when they do it again,
7 their response can be we're sorry, we won't
8 do it again. And there's nothing there that
9 says escalation of multiple penalties for
10 multiple violations of the Open Meeting Law.
11 And in addition, that the penalties seem to
12 be punitive to the violators which is fine,
13 but it doesn't remedy any actions taken at
14 the illegally held open -- or illegally held
15 meeting. And I would have expected and was
16 surprised not to see the first action would
17 be it voids all actions taken at that
18 meeting. It should be declared an illegal
19 meeting, and that meeting didn't happen and
20 no votes occurred or something like that.
21 That not to happen is doing more than
22 encouraging people who have things that they
23 want to, quote, unquote, get away with to
24 hold the meeting in this manner with an

1 improper notification so that people who may
2 oppose it or want to comment on it can't be
3 there and at the end say, sorry, we won't do
4 that again. So, you know, to me that really
5 didn't have -- doesn't have -- seem to have
6 the bite in it that it needs to be if we're
7 really going to look at a system that is
8 enforceable and actionable and would be, you
9 know, if there is a violation, a violation is
10 found to occur and the meeting is voided.
11 That would be a fairly normal thing.

12 Again as a town and our town
13 administration is still running into issues
14 how to post and what to do and this
15 conspicuously visible issue. One thing I
16 want to reiterate, you know, we're trying to
17 put it in a notebook inside if you will,
18 inside the walk-in area of our police
19 station, but it's not visible from the
20 street. It's not, you know, people are
21 saying it's not conspicuously visible, and
22 there's no great sign that says open meetings
23 notices are all inside this door, but it's
24 the 24 hour place that's available without

1 our town and a bunch of other towns having to
2 build outdoor kiosks and keep them, as people
3 have said, keep them clear from the snow in
4 the wintertime and keep them lit at night for
5 24 hours and all that kind of stuff. So I
6 think some of those issues would need to be
7 addressed and I appreciate your consideration
8 of this.

9 Thank you.

10 BRITTE MCBRIDE: Thank you.

11 I am going to ruin this name I know,
12 but Joe Occhiuti. I apologize in advance.

13 JOSEPH OCCHIUTI: Don't apologize.
14 No need. My name is Joseph, that's
15 J-o-s-e-p-h. And the name is pronounced
16 Occhiuti.

17 BRITTE MCBRIDE: Occhiuti.

18 JOSEPH OCCHIUTI: But it's not
19 spelled that way. It's O-c-c-h-i-u-t-i.
20 Thank you for this public hearing.

21 My notes may be a little scattered and
22 it won't take long to get through them. But
23 I know once you get through all the hearings
24 and compile the final document and it's going

1 back to the municipalities, my suggestion
2 would be that when that occurs, that -- and
3 you ask the municipalities to present it as
4 to their elected, appointed or employees that
5 it be mandated for change. Because when it
6 initially came out, it was not mandatory, and
7 we only had 20 people or 21 people in our
8 town sign up to do this. And we have over
9 400 people who are directly connected, not
10 the citizens, but directly connected to the
11 municipality.

12 29.02 and I think it's going to be
13 redundant because it appears again in 29.03
14 where it states emergency means, a sudden
15 generally unexpected occurrence or set of
16 circumstances demanding immediate action. I
17 think it would be helpful if there were some
18 guidelines or examples put in there. Because
19 my emergency may be different than five other
20 people's emergencies. And I think that's
21 also on (a), 29.03.

22 And as the previous speaker spoke, I
23 may stand corrected, at one time I thought
24 the violation was \$1,000 fine. And then I'm

1 pretty sure I read in the paper in the last
2 couple of days that it's gone from a large
3 amount of money to, excuse the term, a slap
4 on the wrist. Somewhere along the line there
5 has to be some penalty for people who are
6 going to do this. And you have to devise a
7 meaningful way to make it stand. And I think
8 one of my most important concerns is that who
9 is mandated to report a violation of the Open
10 Meeting Law? Is it just a citizen? Or
11 should it be people who are connected to the
12 town? The legislative branch, school
13 committee, someone else sees someone else
14 doing it but they keep quiet and nothing is
15 done.

16 So, this Open Meeting Law is basically
17 for whom? The general public to be the watch
18 dogs? When I know personally that one body
19 of a municipality knew that another body was
20 violating the Open Meeting Law and did
21 nothing about it. Now, is it -- should it be
22 -- and it goes back to this young lady behind
23 me who did a remarkable job, everything falls
24 on the clerks, it seems to fall on the

1 clerk's shoulders. I think once that clerk
2 has been notified of a violation, it should
3 go to the legislative branch, they're the
4 ones that make the decisions in the
5 municipality. Not a clerk who's hired who
6 may not make the right decision, and all of a
7 sudden may be on the other side of the fence.
8 So I think there should be a governing body
9 or person who must make that decision
10 locally.

11 I think that's it. I know that there
12 are a lot of people -- and I'm on committees
13 in my community, and I get telephone calls as
14 some of my colleagues do you know someone
15 violated the Open Meeting Law? Or someone is
16 doing something in conflict of interest? And
17 they look for certain people to do these, and
18 that's not right. There should be a defined
19 method that if there is an infraction with
20 the Open Meeting Law, everybody must take
21 action, including people who are elected,
22 appointed, employees and the general public.

23 Thank you very much.

24 BRITTE MCBRIDE: Thank you,

1 Mr. Occhiuti.

2 We're going to recess for one second
3 while we get the follow-up list of folks to
4 testify.

5 Peter L. Smith.

6 PETER SMITH: Somewhat easier name
7 to pronounce. Good afternoon.

8 I represent approximately 20 school
9 committees in the four counties in western
10 Massachusetts: Hamden, Hampshire, Franklin
11 and Berkshire. I'm here with the
12 superintendent from the East Long Meadow
13 Public Schools. We had a meeting last night,
14 type of training on the Open Meeting Law, and
15 there were some specific questions from the
16 committee as well as from other committees
17 which I represent.

18 Two main areas of concern: After
19 reading the statute and then looking at the
20 Attorney General office quick glance at the
21 Open Meeting Law and then looking even more
22 extensively at the July 1st Open Meeting Law
23 guide of the Attorney General's office, I was
24 hoping on behalf of these committees to get

1 some guidance in two areas:

2 One is fairly simple and one is not.

3 Under regulation 29.031 (d) it mirrors
4 Section 20 of the statute where one of the
5 requirements of the notice is a listing of
6 topics. Members of the East Long Meadow
7 School Committee as well as other committees,
8 have asked if that's a requirement and except
9 in emergency situations, the notice must be
10 tendered to the public at least 48 hours in
11 advance. What happens if there are additions
12 to the agenda at a school committee meeting,
13 are those allowed because they have not been
14 noticed to the public in advance?
15 Unfortunately the regulations don't answer
16 that.

17 What is more concerning and what I was
18 hoping the regulations would answer is under
19 Section 22 of the statute, it is stated that
20 committees, government bodies as obviously
21 school committees are subject to the Open
22 Meeting Law, must keep a summary of the
23 discussions on each subject. And the word
24 summary is used both in sections for open

1 meetings as well as for executive sessions.
2 I scoured the emergency regulations under
3 Section 29.02, your definitions, and was
4 hoping to find a very lengthy entry with the
5 word underline summary with a definition of
6 what the word summary meant, because that is
7 the question that is constantly asked of me.
8 I didn't find it. I called your office, and
9 one of your attorneys was very gracious in
10 trying to help determine what does that mean?
11 What's the difference between a summary for
12 open sessions and for executive sessions?
13 But quite frankly "use your best judgment" is
14 not the type of guidance that I would propose
15 is most helpful to public bodies.

16 And so, on behalf of committees that I
17 represent, I would hope that when you finally
18 adopt these regulations, that you would
19 include or consider including what the
20 definition of summary means. We know it's
21 not a transcript because that's what your
22 guide says. And we know it's not simply a
23 record of official action taken by the body.
24 The problem arises because up until July 1st,

1 the -- as you know, the District Attorney's
2 offices in the counties had different
3 interpretations of what minutes, both open
4 meeting minutes and executive session
5 minutes, what detail must be included.
6 There's a -- there was a difference that I
7 knew of between Hamden and Hampshire County.
8 And I'm told that's true in the eastern
9 counties as well. It's hope now that because
10 everything is under the auspices of the
11 Attorney General, that there will be a
12 definition or specific guidance to school
13 committees and other government bodies as to
14 the type of detail that the Attorney
15 General's office expects in both open meeting
16 minutes and in executive session minutes,
17 what that word summary means. It's somewhere
18 we know in the middle of an actual
19 word-for-word transcription and simply the
20 record of official action. But that's a vast
21 area, and it really needs some immediate, in
22 my opinion, guidance or advice. I know that
23 the regulations do allow, as does the
24 statute, an advisory opinion from the

1 Attorney General. I would respectfully
2 suggest that she consider this one of the
3 first areas to offer advice.

4 Thank you.

5 BRITTE MCBRIDE: Thank you.

6 Is there anyone else who would like to
7 testify at this point in time?

8 (No response).

9 BRITTE MCBRIDE: What we're going to
10 do at this point is to recess, and I think we
11 will come back in at 5:30. If there are
12 additional individuals who would like to
13 testify at that point in time, certainly we
14 would like to hear from you. But at this
15 point in time we'll recess and give others a
16 chance to appear at the hearing. I know that
17 we intentionally scheduled this hearing such
18 that people would have an opportunity, we
19 hoped, if they had work schedules that
20 wouldn't allow them to testify during
21 business hours, to be here afterwards. So
22 we'll stand in recess now for about 40
23 minutes.

24 (A short recess was taken).

1 BRITTE MCBRIDE: We're going to
2 reconvene this hearing on the Open Meeting
3 Law regulations. The regulations are being
4 promulgated pursuant to Chapter 30A, Sections
5 2 and 3 as well as Chapter 30A, Sections 25
6 (a) and (b) of the General Laws.

7 I will now call Mr. Bill August to
8 testify.

9 WILLIAM AUGUST: Hi and thank you
10 very much for holding a series of public
11 hearings on the new Open Meeting Law and for
12 the opportunity to submit some testimony.

13 My name is William August. I'm an
14 attorney and principal and partner at the law
15 firm of Epstein and August, LLP in 101 Arch
16 Street, Boston, Massachusetts. I come here
17 with, I think, a relatively unique background
18 and experience in municipal law, which in
19 fact while I was at a nearby Town Hall doing
20 part of my life long practice in municipal
21 law, and thinking I could make it to the
22 hearing, I came, but with no prepared
23 comments. But more impelled by what I feel
24 to be some of the very important principles

1 that impelled me to come here when I realized
2 I would have time after a somewhat shorter
3 than expected town meeting over at
4 Southbridge Town Hall. I could not attend
5 the Boston meeting.

6 My somewhat unique perspective is that
7 I was a former general counsel of the
8 Massachusetts then cable television
9 commission before it was -- when it was --
10 before it was merged into the Department of
11 Telecommunications and Cable and actually
12 before that, DTE, Department of
13 Telecommunications and Energy. And as
14 general counsel there and as legal counsel
15 there for many, many years -- I was there for
16 probably eight or nine years -- you know how
17 it is when you're in a state agency, you see
18 everything that comes through the door. And
19 one of the areas of practice there was just
20 getting every imaginable call about every
21 imaginable license which often involved the
22 creation of non-profit cable studios which
23 were taking over cable company business.
24 None of the governments were running studios.

1 Cable companies ran studios in the old days
2 as part of how they captured audience. It
3 was a traditional business practice. And
4 some of the towns took over that function as
5 the companies wanted -- started pushing the
6 studios over to the towns. And the towns
7 said we, we've never ran a studio before.
8 This is not a municipal function. This is
9 more in the nature of a cable company
10 function. And the industry and the
11 municipality settled on this non-profit form
12 as a way of continuing the privatization of
13 the studio and keeping a real insulation of
14 the municipality from the private studio
15 activities.

16 The reason I'm bringing up some of this
17 unique history of cable is because there are
18 occasionally persons who want these private
19 studios, they're overwhelmingly private, to
20 be subject to the Open Meeting Law. And it
21 reflects a profound misunderstanding of the
22 history and genesis and the actual operation
23 of private studios, which more than other
24 non-profits -- I state this from firsthand

1 knowledge, which goes beyond being general
2 counsel at the cable commission for many
3 years, which I'll explain. More than other
4 non-profits, far more than other non-profits.
5 They were intended to be private, because
6 they had a special First Amendment role that
7 flourishes when it has a media identity, when
8 it feels -- when the members and volunteers
9 who are the life blood of studios feel that
10 they're part of the media world. Then they
11 can be media, walk like media, talk like
12 media, which was the intent of local channels
13 in the first place. They're TV channels.
14 They're TV studios. They're media people.
15 It's what excites the kids at the journalism
16 schools and the interns, wow, I'm working at
17 a TV studio. Not I'm working Town Hall this
18 summer. That's great. I'm a government
19 person. I went to law school to work in
20 government. And I'm a government person.
21 When I worked for a state agency, I knew I
22 was in government. When you work in a TV
23 studio, you think you're part of the private
24 media seen through this non-profit animal

1 called the public access corporation.

2 Even when the public -- then I went
3 into private practice. I joined a law firm,
4 another attorney who just represented
5 municipalities in cable franchising. And
6 then he went on to become president of a
7 Massachusetts college, and I joined the other
8 major attorney representing municipalities in
9 cable licensing, Peter Epstein, who's
10 represented over 150 municipalities in cable
11 franchising. I've been with him since 2000.
12 It's now about ten years.

13 And in that process we've continued to
14 represent municipalities. And I have been at
15 the table sitting across from the selectmen
16 or the mayors when we've said how do you want
17 to set up your studio? Comcast won't do it
18 anymore. And this is a fact. Comcast, if
19 you're doing license renewal, they won't do
20 it anymore. You can beg, grovel and scream.
21 They won't keep running the studio. They
22 will write the check, they will support the
23 studio. So we say to the town do you want to
24 set-up a non-profit? Be a private

1 non-profit? Or do you want to create a
2 department? They're very good at creating
3 departments. That's what they do. They
4 usually create governmental departments.
5 They know how to do that. They never -- once
6 in a blue moon they'll say let's set-up a
7 department, we'll keep it in-house. I would
8 say 49 out of 50 times, if you look at the
9 landscape of studios, they'll say let's
10 set-up into private non-profit. We don't
11 want the phone calls basically. We don't
12 want the liabilities. We want to make sure
13 it does what it was intended to do, but as
14 long as it's doing what it was intended to
15 do, let them do it autonomously and
16 privately.

17 So the fact that there may be an
18 occasional residual report, doesn't mean that
19 they're having any say whatsoever in the
20 budget. They may just get a report. They
21 may have advisory and consultative roles, but
22 they don't have control roles. So I felt in
23 light of some bubbling questions about this,
24 every now then, including right now, in one

1 particular case from one disgruntled
2 individual, that in light of the fact that
3 there's a new Open Meeting Law, that folks
4 could in a well meaning way think oh, well
5 let's just extend the Open Meeting Law. Oh,
6 but we love the Open Meeting Law. The Open
7 Meeting Law is a beautiful thing. Let's
8 extend it, get these non-profits. But it's
9 not a good thing when you change the deal in
10 that kind of way, and because the energy of
11 the studios is from the volunteers, it's from
12 the board members, and what attracts them and
13 draws them is they don't want to, like --
14 they were given the deal of being in a
15 private studio where they can be part of a
16 private non-profit and not have to worry
17 about well, am I intentional violation of
18 Open Meeting Law? Am I a government employee
19 now? And all these things that were never
20 intended.

21 So, I do have a unique perspective --
22 not unique because there are other attorneys
23 at municipal law firms. One of whom I spoke
24 with before coming here who also specializes

1 in this field. And he said the same thing,
2 when you're sitting across from the mayors or
3 the selectmen and explaining the options,
4 they want it to be private non-profit in a
5 true way. There are so many indicia of the
6 truly private nature of these private
7 non-profits that it's important to be aware
8 of, because they can easily be obscured by
9 those who would point out that oh, the
10 selectmen appointed the initial board. Or
11 oh, the selectmen retained some appointing
12 authority. Because there's a huge difference
13 between appointing and controlling. The
14 power to appoint is the power to say, we
15 would like to help constitute it, to create
16 it, but then after the day of creation is
17 what determines whether there is control or
18 not. After the day of the creation, you
19 know, after the initial appointment, there is
20 -- and all the attorneys who set up
21 non-profits know this. And my practice has
22 grown not only into municipal law but
23 non-profit law. We incorporate under Chapter
24 180. So when we incorporate, Chapter --

1 Section 6 (c) of Chapter 180 is, you know,
2 it's often called the venerable Section 6 (c)
3 because it establishes the duty of loyalty of
4 the directors to the corporation. So when
5 you incorporate under Chapter 180, by law you
6 are not creating a corporation that can
7 legally have directors that are beholden to
8 the government, because 6 (c) says the
9 directors shall have a duty of loyalty. The
10 exact words are they must carry out the --
11 well, the exact words, I'll have to do --
12 they must carry out the best interests of the
13 organization. And then all the case law says
14 that's the common law duty of loyalty.

15 The -- I forget if it's the Framingham
16 Middlesex DA opinion on whether an access
17 corporation is a private body or a government
18 body or the state ethics commission, Walham
19 access corporation decision, both reached the
20 decision that the access corporations were
21 not governmental. One of them specifically
22 mentions this fiduciary duty of directors is
23 presumptively to the corporation by General
24 Law, Chapter 180 in Section 6 (c). Section 3

1 of Chapter 180, Chapter 180 is the non-profit
2 law like 156 has sections for business
3 corporations, Chapter 180 enables the
4 incorporation of non-profit. Section 3 of
5 180 on indemnification of the directors says
6 that the directors can lose -- you know,
7 corporations are free to indemnify their
8 directors except when they're not acting in
9 good faith to carry out the interest of the
10 corporation. So not only is there a duty to
11 carry out the -- they have a fiduciary duty
12 to act on behalf of the corporation. So once
13 created, however appointed, however those
14 directors are appointed, there is a legal,
15 independent duty and, therefore, a
16 presumption that they're acting to carry out
17 the mission of the corporation. A well
18 drafted purpose clause in articles of
19 organization for an access corporation will
20 define -- the purpose is to basically to
21 provide local programming. And that was
22 historically a -- it was a TV company thing.
23 So it's not historically a public function.
24 I don't know many cities that historically

1 rent TV studios.

2 But it can get obscured because some do
3 want to set up separate departments to run
4 TV, but it's still, when they do do that at a
5 municipal level, it in no way negates the
6 fact that those cities and towns that chose
7 to do it through a private non-profit are
8 still doing it in the form which is intended
9 to be a private non-profit.

10 The other reason why mayors and
11 selectmen are so clear -- and I tell you this
12 from personal observation, knowledge,
13 literally having been at the table at this
14 juncture 40 times, they want a private
15 non-profit. They don't see it as
16 governmental. In addition to that, they
17 don't want to get the calls, why are they
18 doing MTV at ten in the evening? The mayor
19 doesn't want that call. He wants to say call
20 the access corporation, they have an
21 independent board of directors. We may have
22 one or two appointees, or we may have even
23 appointed them, but they're an independent
24 corporation. They don't want to deal with

1 those calls. And worse. And also they don't
2 want legal liabilities. So there are many
3 reasons why they have truly intended to
4 privatize them.

5 I can tell you that in about all of the
6 cable contracts that I have done on behalf of
7 cities or maybe 99 percent, there are
8 sections which say the access designee or the
9 access corporation shall manage the funding.
10 Literally those are the exact words. That's
11 the substance of it. There may be a slight
12 variation. They will say they shall operate
13 and manage the channels. It says, they are
14 empowered to take -- engage in such other
15 activities as is customary for an access
16 corporation. Showing not only like a
17 finite -- that's always put in in the
18 description of powers of access corporations,
19 not always, but it's very common, so that
20 they may engage in such other acts as they
21 determine to be necessary to carry out access
22 activity. You know, you can't think of many
23 governmental bodies, now called public bodies
24 I guess under the new statute which is one

1 reason I thought I should come here, because
2 I think that's so confusing. What is the
3 difference between a governmental body and a
4 public body? I don't really know. And I
5 think one of the things that could come out
6 of this process is that there could be some
7 clarification that there being no evidence of
8 an intent to vary prior law, you know, we
9 shall be guided by prior precedent. Because
10 otherwise there's this ambiguity which is
11 very confusing like you change -- the words
12 are changed from government body to public
13 body. The words are also changed -- it used
14 to say government body of the city or town.
15 Now it says government body within a city or
16 town. So, that creates this theoretical risk
17 that someone can say oh, there's a new law,
18 we can re-decide what the ground rules here
19 are. But I think those changes in the
20 language are de minimus. I think the change
21 of the words from of town to within a town is
22 purely a grammatical result of the preceding
23 clause in the definition of public body. The
24 clause public body in the new law changes

1 from the old law, because the new law adds
2 the words within the legislative or executive
3 branch. The public body is a body within the
4 legislative or executive branch. So then it
5 carries the within word to within a town and
6 city. They basically just wanted parallel
7 construction. It sounds awkward to say of
8 the legislative branch or of the executive
9 body. So they said within in one place, so
10 they carried the within to the next clause.
11 So I think that should be dismissed as just a
12 grammatical parallel structure and not
13 implying any intent to change prior
14 precedent.

15 So, there are, you know, many, many
16 other factors showing that the overarching
17 intent is for these non-profits to be private
18 in nature. I've touched upon many of them,
19 some of them, but I think there are many,
20 many more as I don't have prepared
21 statements. But I did want to -- because I
22 care that it's created a vibrant community.
23 And when you see that happening, you know,
24 when it ain't broke, don't fix it because you

1 might hurt it. The non-profit sector is --
2 everywhere you read it's growing. Even in
3 the great recession of 2008, you know, there
4 is an explosion of non-profit activity still.
5 They're hurting, but they're still growing in
6 numbers. People love that sector. It's a
7 huge part of the Massachusetts sector. You
8 should be very careful from a public policy
9 perspective of fundamentally tampering with
10 the identity of it because of one esoteric or
11 two inquiries or complaints that maybe they
12 have some badges of governmentality through
13 government initial creation.

14 There's a long tradition of
15 governmental creation of non-profits that
16 were never intended outside of the cable
17 world that were never intended to be
18 governmental. Some of our greatest
19 institutions, the Red Cross was created by an
20 act of Congress. It's a non-profit, tax
21 exempt organization. The Trustees of
22 Reservations, one of the greatest
23 institutions of Massachusetts, you know,
24 manages like Walden Pond and Crane's Beach.

1 That was created by an act of a legislature.
2 Government created. Some government
3 appointment roles. But there's a vision in
4 government when it creates a non-profit.
5 It's doing something a little different, and
6 it's an inherent power that government has
7 had. And over something like the Open
8 Meeting Law, which I do love, work for truly
9 governmental bodies, we should realize that
10 in a well meaning way, we shouldn't change
11 the fundamental identity of non-profit
12 institutions through the back door, through
13 an Open Meeting Law process when there was no
14 clear legislative intent to change prior law.
15 This is a long body of jurisprudence, very
16 respected jurisprudence about narrowly
17 defining what is a governmental body.

18 If you look at the State Ethics
19 Commissions decisions, because they've had
20 this question on non-profits. Is this
21 pension board a non-profit? Is this studio a
22 non-profit? Is this -- is it a governmental?
23 Or they say we much narrowly construe it
24 because the intent was to reach governmental

1 bodies. And the ordinary person thinks of
2 the fiduciary duty of the directors as to
3 their corporation, therefore, they're not
4 under government control. So that's the
5 presumption.

6 This jurisprudence on the narrowed
7 definition of governmental body, when looking
8 at non-profit entities, is not just District
9 Attorney opinions. It's a long line of State
10 Ethics Commission decisions and there's a long
11 line of case law holding the same thing.
12 They basically say that there's no specific
13 litmus test. You have to look at the
14 multiple factors and really do a multi-factor
15 analysis and see if those factors are
16 present. You know, do the directors
17 understand that they have the duty of loyalty
18 to the corporation? Is there -- has there
19 been interference with the budget or is the
20 non-profit spending its own money and
21 controlling the funds?

22 Every non-profit I've been involved
23 with pursuant to their licenses has had
24 authority to manage their own funding. And

1 since they're under long-term licenses, cable
2 licenses are ten years average. Initial
3 licenses are 15 years. They're not worried
4 about oh, maybe ten years from now or eight
5 years from now they can change the license.
6 You know, that can happen, but they are given
7 free reign for the whole long term license.
8 The reason cable licenses are long term is
9 because of all the capital investment every
10 time there's a renewal. So this is built
11 into the nature of the industry. They can't
12 advertise their investment in a cable plan in
13 a three-year license or a four-year license.
14 So initial licenses are 15 years, up to 15
15 and 99 percent of them are. And the access
16 corporations have enjoyed those long duration
17 operations.

18 I think that, you know, those are like
19 really -- I guess I just wanted to end on
20 maybe the broader note that I was just
21 remembering in those last comments about the
22 vibrancy of the non-profit sector, it comes
23 from -- and I think it's more timely today in
24 a way and shows the wisdom of this model as

1 the non-profit sector is growing, that we let
2 it thrive and not governmentalize it because
3 there is a -- it's so consistent sort of with
4 this modern and historical values of don't do
5 everything through government. You know, try
6 to have partnerships between government and
7 universities, government and the private
8 sector, government and the non-profit sector.
9 And that kind of partnership implies, you
10 know, don't change the rules on everybody.
11 Let them grow in partnership the way they've
12 had their ground rules in the past. And I
13 think this gives governments some
14 versatility. They don't have to do
15 everything through another governmental
16 department. They have this choice of doing
17 things a little more creatively through the
18 non-profit sector. So it's good for
19 government to have that installation and
20 separation and it's good for the non-profit
21 sector to have installation and privatization
22 and separation.

23 So I've been fascinated with the
24 subject personally and legally and

1 professionally and without prepared comments
2 wanted to share some of those experiences. I
3 think I've seen a lot of it, and the intent
4 is to clearly be private non-profit, not
5 governmental.

6 BRITTE MCBRIDE: Thank you. We
7 appreciate those comments.

8 And I would also encourage you to
9 submit any comments in writing as well. The
10 public period is open until August 18th and I
11 would certainly encourage that.

12 WILLIAM AUGUST: Thank you. I would
13 love to and I'm just -- it's been so behind
14 on so many things it's just one of those
15 periods that.

16 BRITTE MCBRIDE: We all took copious
17 notes.

18 WILLIAM AUGUST: I know. Thank you
19 very much.

20 BRITTE MCBRIDE: And there will be a
21 transcript, too. Thank you, Mr. August.

22 SHEILA CALKINS: We're glad you were
23 able to make it during your visit out here.

24 BRITTE MCBRIDE: With that we will

1 conclude today's hearing. And public comment
2 is open until August 18th.

3 Thank you.

4 SHEILA CALKINS: And the time is
5 5:55.

6 Thank you.

7 (Hearing Concluded at 5:55 p.m.)

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C E R T I F I C A T E

COMMONWEALTH OF MASSACHUSETTS
BRISTOL, SS.

I, Catherine Lawson Zelinski, a
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